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In the

Supreme Court of the United States

October Term, 1970

No. 989

BILLY BAXTER, INC.,
Petitioner,

v.

THE COCA-COLA COMPANY and
CANADA DRY CORPORATION,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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January 18, 1971

INDEX

	PAGE
OPINIONS BELOW	1
QUESTION PRESENTED	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING CERTIORARI	5
I. The Standing Requirement	5
A. The Rule Followed in All Circuits	5
B. Application of the Rule to This Case	9
C. The Asserted Conflict	11
CONCLUSION	15

TABLE OF AUTHORITIES

Cases

PAGE

Conference of Studio Unions v. Loew's Inc., 193 F.2d 51 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952) 14

Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D. Pa. 1953), aff'd, 211 F.2d 405 (3d Cir.), cert. denied, 348 U.S. 828 (1954) 6, 14

Hoopes v. Union Oil Co., 374 F.2d 480 (9th Cir. 1967) 7

Kiesel Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955) 7, 11

Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.), cert. denied, 352 U.S. 880 (1956) 7, 14

Miles v. John Hancock Mutual Life Insurance Co., 148 F. Supp. 299 (D. Mass.), aff'd, 242 F.2d 758 (1st Cir.), cert. denied, 355 U.S. 828 (1957) 6, 14

Nationwide Auto Appraiser Service, Inc. v. Association of C. & S. Cos., 382 F.2d 925 (8th Cir. 1967) 7, 10

Perkins v. Standard Oil Co., 395 U.S. 642 (1969) 13

Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678 (2d Cir. 1955), cert. denied, 350 U.S. 936 (1956) 6, 9, 13, 14

Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) 14

Radovich v. National Football League, 352 U.S. 445 (1957) 14

Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679 (8th Cir. 1966) 12

Schwartz v. Broadcast Music, Inc., 180 F. Supp. 322 (S.D.N.Y. 1959) 9

SCM Corp. v. Radio Corp. of America, 407 F.2d 166 (2d Cir.), cert. denied, 395 U.S. 943 (1969) 6, 9, 14

	PAGE
Snow Crest Beverages, Inc. v. *Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956)	6, 10
South Carolina Council of Milk Producers, Inc. v. *Newton*, 360 F.2d 414 (4th Cir.), cert. denied, 385 U.S. 934 (1966)	7, 13
Volasco Products Co. v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), cert. denied, 372 U.S. 907 (1963)	7, 11, 14

STATUTES

15 U.S.C. §§ 1-7	1
15 U.S.C. §§ 12-27	1
15 U.S.C. § 13	1
15 U.S.C. § 15	1, 5
N. Y. Bus. Corp. L. § 1301(a)	4

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Opinions Below

The opinion of the District Court is reported at 47 F.R.D. 345 (S.D.N.Y. 1969). The opinions of the Court of Appeals are reported at 431 F.2d 183 (2d Cir. 1970). All opinions are printed as appendices to the petition.

Question Presented

Did the courts below properly apply the well established standing to sue rule in deciding that petitioner, who was not in the business of manufacturing, selling or purchasing carbonated beverages, could not sue for alleged conspiracy and restraints in that line of commerce?

Statement of the Case

This is a treble-damage action, commenced by petitioner Billy Baxter, Inc. ("Billy Baxter") in May, 1966 against respondents for alleged violations of the antitrust laws* in

* 15 U.S.C. §§ 1-7; 15 U.S.C. §§ 12-27; 15 U.S.C. §§ 13, 15.

the non-alcoholic carbonated beverage business. Petitioner, however, was not in the business of manufacturing, selling or purchasing such products.

After two years of pre-trial discovery, respondents moved for summary judgment on the ground that the undisputed facts developed during discovery established that petitioner had no standing to sue respondents under the antitrust laws. Thus, the facts were to be determined from the evidence before the District Court, not the mere allegations contained in petitioner's complaint and briefs. In deciding the motion, the District Court reviewed numerous affidavits, answers to interrogatories and depositions brought forth by respondents, as well as affidavits of petitioner's president and answers to interrogatories brought forth by petitioner. The District Court (Ryan, J.) granted respondents' motion and the Court of Appeals affirmed.*

The undisputed facts are, as follows: Billy Baxter, a Pennsylvania corporation, was organized in 1962. Its business activities consisted of the following:

> (a) it licensed and "franchised" four independent bottlers, serving parts of Pennsylvania, Ohio, West Virginia and New York, to use the Billy Baxter trademark and to sell non-alcoholic carbonated beverages thereunder; and
>
> (b) it purchased from manufacturers flavor ingredients used in the production of non-alcoholic carbonated beverages which it resold, without rebottling, to its "franchised" independent bottlers, who then manufactured, bottled, distributed and sold the beverages.

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* In the Court of Appeals, Judge Anderson wrote the majority opinion; Judge Weinfeld of the District Court, sitting by designation, concurred. Judge Waterman dissented.

Billy Baxter, therefore, was only a "franchisor" or licensor and a supplier of ingredients, and its only "customers" were its "franchised bottlers." As the opinion in the Court of Appeals pointed out:

> "[Billy Baxter] manufactured no products, and the bottlers did not act as its agents in doing so. The franchisor merely licensed the information needed for the manufacture of the beverages, supplied ingredients which still others had manufactured and left further production activities to its franchisees."*

Billy Baxter's business activities did not flourish. Its operations required its franchisees to use a uniquely-shaped non-returnable bottle and to distribute products which "sold at a higher-than-average cost." Several vendors acknowledged difficulties in marketing the products because of a lack of consumer appeal.

In its first year of operation, petitioner's gross income was approximately $18,000. Gross income rose to $45,500 in the second year, but declined drastically thereafter. Ultimately, three of the four "franchised" independent bottlers relinquished their franchises.

Billy Baxter filed its complaint against respondents in May, 1966, seeking treble damages of $1,500,000 for lost profits estimated at $500,000 over the period beginning January 2, 1963.** The complaint in sweeping language

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* Petitioner's printed license agreement with its "franchisees" explicitly provided that each licensee was to be an independent operator and not "the agent or representative of Billy Baxter for any purpose whatsoever."

** The damages claimed by petitioner were loss of licensing royalties and loss of resale profits. Petitioner estimated that it lost profits of $38,000 in 1963, $70,000 in 1964, and $130,000 in 1965. The estimates were not supported by any detailed information and should be compared to petitioner's actual gross income which never exceeded $50,000 a year during the time in question.

charged violations of the antitrust laws and made the general allegation that the conspirational acts of respondents restrained competition in and tended to create a monopoly of the "non-alcoholic carbonated beverage industry" in five states.

Respondents moved for summary judgment in July, 1968, arguing that the damages claimed by petitioner—loss of licensing royalties and loss or resale profits on flavor ingredients—did not give rise to standing to sue because they amounted to no more than a claim of remote injury which petitioner suffered derivatively by reason of an alleged injury to some third person.

Some two months later (and some 27 months after the action was commenced) petitioner countered by moving for leave to amend its complaint. In an effort to avoid the clear case authority establishing petitioner's lack of standing to sue under the antitrust laws, the proposed amended complaint alleged an antitrust violation virtually indistinguishable from the original complaint, with one exception; petitioner sought to allege—contrary to admissions earlier made, without any affidavits or other evidentiary support, and as the courts below found, contrary to facts established by independent affidavits and public records—that it was in the business of selling bottled beverages bearing its trademark to retail outlets in the alleged five state market.*

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* Facts of public record indicated that petitioner was not in the business of selling carbonated beverages in the alleged five state market. Petitioner's Pennsylvania articles of incorporation did not authorize it to sell carbonated beverages in Pennsylvania. Petitioner could not lawfully sell such beverages in New York since it was not authorized to do so in its state of incorporation. N.Y. Bus. Corp. L. § 1301(a) (McKinney's Consol. Laws 1963). Public records in New Jersey, Ohio and West Virginia revealed that petitioner had not qualified to do business in any of those states.

Both motions were argued in the District Court in October, 1968. Two weeks after argument and more than a month after petitioner had moved to amend its complaint, it served still another motion. To extricate itself from its prior judicial admissions concerning its business activities, petitioner sought to amend its answers to interrogatories to withdraw the admissions contained therein.

The District Court denied petitioner's motions for leave to amend its complaint and its interrogatory answers, finding that the facts were as stated in petitioner's original interrogatory answers as shown by uncontroverted, independent evidence, and it granted respondents' motion for summary judgment.

The Court of Appeals affirmed in all respects.

Reasons for Denying Certiorari

This case involves nothing more than the application of well-settled rules to a particular set of facts. It was correctly decided in the courts below.

There is no conflict among the courts of appeals on the legal issues involved, and this case presents no important federal questions for this Court to review.

I.

THE STANDING REQUIREMENT

A. *The Rule Followed in All Circuits.*

For many years, the federal courts have uniformly held that the right to sue under Section 4 of the Clayton Act (15 U.S.C. § 15) is limited to persons who are in the business where the alleged antitrust violations occurred

and whose injuries are "directly" caused by the illegal activity. It is not enough that the ultimate effects of the activity, filtered through many layers of the economy, allegedly caused some loss. Plaintiff must show that his injury was not "indirect" or "remote," but rather that he actually was in the business in which the alleged illegal activities occurred.

The principles behind the "direct injury" requirement have been recognized and applied in many cases in numerous circuits. For example:

First Circuit:

"The injuries set forth thus seem to fall within the class of indirect and speculative injuries for which plaintiff cannot recover under 15 U.S.C.A. § 15" *Miley* v. *John Hancock Mutual Life Insurance Co.*, 148 F. Supp. 299, 303 (D. Mass.), *aff'd*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957). See also *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956).

Second Circuit:

"Those harmed only incidentally by antitrust violations have no standing to sue for treble damages; only those at whom the violation is directly aimed, or who have been directly harmed may recover." *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956). *Accord, SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166, 170-71 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969).

Third Circuit:

"[T]he courts recognize that the Act does not give a right of action to every one who can trace a financial loss, however remote, to a violation of the antitrust

laws." *Harrison* v. *Paramount Pictures, Inc.*, 115 F. Supp. 312, 317 (E.D. Pa. 1953), *aff'd*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954). *Accord*, *Melrose Realty Co.* v. *Loew's, Inc.*, 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U. S. 890 (1956).

Fourth Circuit:

"If the damage was merely incidental or consequential, or if the defendants' antitrust acts are so removed from the injury as to be only remotely causative, the plaintiffs have not been injured 'by reason of anything forbidden in the antitrust laws' as contemplated by the Clayton Act." *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414, 419 (4th Cir. 1966), *cert. denied*, 385 U.S. 934 (1966).

Sixth Circuit:

"It is well established in the law that a supplier is too remote and too far removed from the direct injury to recover damages resulting from violation of the antitrust laws directed against the supplier's customer." *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 395 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

Ninth Circuit:

"[t]he rule is that one who is only incidentally injured by a violation of the antitrust laws,—the bystander who was hit but not aimed at,—cannot recover against the violator." *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955). *Accord*, *Hoopes* v. *Union Oil Co.*, 374 F.2d 480, 485 (9th Cir. 1967).

Tenth Circuit:

"The newer and the older cases both present much the same terms to work with although expressed in somewhat different language. . . . [W]e hold that under the authorities the plaintiff here has not alleged

a cause of action under the Clayton Act because its position relative to the injuries resulting from the alleged acts of the defendants is too remote.

"... [I]ts damages resulting from the acts of defendants would come about 'indirectly,' 'remotely,' or as 'derivative damages.'" *Nationwide Auto Appraiser Service, Inc.* v. *Association of CdS. Cos.*, 382 F.2d 925, 928-29 (10th Cir. 1967).

The well-established rule, illustrated by the foregoing cases, has long been a limitation upon the sanction of penal treble damages. The reasons behind it are simple and compelling. It can be (and it has been) argued that every restraint of trade in some degree injures every person involved in the economic and social community. Customers, creditors, stockholders, employees, suppliers, patent and trademark licensors—in short, each and every person dealing with and deriving gain from a restrained enterprise—may arguably be said to suffer injury from the restraint.

The courts have properly concluded, however, that Congress did not intend to allow anyone who could assert a remote connection with an alleged restraint of trade to maintain a suit for treble damages. Without some limitation to "direct" injuries, courts would be literally flooded with private antitrust suits. Defendants would face possible liability far in excess of the threefold limitation as a result of multiple judgments. Since it is relatively easy to allege a restraint of trade, yet very expensive to defend against such suits, unsuccessful businessmen would be encouraged to make money by filing suit and using litigation costs to force settlement.

To avoid a flood of treble damage actions by persons with remote claims, the federal courts have unanimously

held that the treble damage recovery is available only to parties in the business where the alleged antitrust wrongs occurred and who are immediately and directly injured by alleged antitrust wrongs.

B. *Application of the Rule to This Case.*

As applied to facts comparable to the case at bar, the standing rule has always produced the same result—a finding that the plaintiff lacked the requisite standing to maintain his action, whether he be characterized a "franchisor" or licensor or supplier of ingredients. There is no case to the contrary.

Petitioner's business activities as a licensor and its claim of injuries based on loss of royalties is no more compelling than the claims of other licensor antitrust plaintiffs who have been held to lack standing. In *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956), a patent owner who had granted an exclusive license to manufacture the patented invention sued a competitor of the licensee. Plaintiff argued that it had been damaged through lost royalties since the licensee's sales were diminished because of defendant's acts. The District Court and the Court of Appeals both concluded that the patent owner whose alleged injury was loss of royalties because of antitrust violations affecting the business of the licensee could not maintain the action.

A similar fact pattern yielded a similar result in *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969) (patent licensor not in the business). See also *Schwartz* v. *Broadcast Music, Inc.*, 180 F. Supp. 322 (S.D.N.Y. 1959).

Petitioner's business activity as a "franchisor" is also no more compelling than that of the "franchisor" plaintiff in *Nationwide Auto Appraiser Service, Inc.* v. *Association of C. & S. Cos.*, 382 F.2d 925 (10th Cir. 1967). There plaintiff granted exclusive territorial franchises to independent businessmen who then engaged in the automobile damage appraisal business using plaintiff's name. Plaintiff did not itself engage in any appraisal activities, but derived its income from payments by the franchisees based on a percentage of their gross receipts. Defendants, an association of insurance companies, were charged with conspiring to sponsor a single damage appraiser in certain areas, thereby injuring the franchisees and ultimately depriving plaintiff of income. The Court of Appeals held that defendants were entitled to summary judgment. The court said:

> "The facts of the case before us and our view of the law issue dictate that we follow the general standards of the decided cases in such comparable situations rather than seek to extend the right to recovery or to relax the rule in instances of summary disposition." 382 F.2d at 929.

Finally, petitioner's business as a supplier of ingredients and his claim of injury based upon loss of resale profits on ingredients is substantially weaker than that of other suppliers who have been held to lack standing, since petitioner, unlike the others, did not even manufacture the ingredients but merely purchased and resold them.

In *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956), a manufacturer of flavor extracts which were used as a major ingredient in making beverage syrup sued because of antitrust violations affecting the business of the syrup manufacturer. Plaintiff sup-

plied 90% of its output to the allegedly injured manufacturer, and the supplying and manufacturing corporations were commonly owned by one individual and his wife. The District Court (Wyzanski, J.) held that plaintiff could not sue for its loss of revenues from the sale of its ingredients since it was not in the business directly affected by the antitrust violation.

See also *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

The decision below was clearly correct and requires no further review.

C. *The Asserted Conflict.*

Petitioner's assertion of a conflict among the circuits concerning the standing rule is based on a misapprehension of what a "conflict" means.

Petitioner apparently sees a conflict because in some cases standing was found to exist, while in others it was found lacking. But these differences in ultimate result occurred not because of any disagreement as to the proper legal rule to be applied, but arose solely from the different facts involved in each case.

The cases cited by petitioner in no way indicate any conflict among the circuits respecting the application of the standing rule to facts similar to those presented here. In each case in which plaintiff was held to have standing, plaintiff was in the business in which the antitrust violations occurred and was directly injured thereby. For example, *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955), was a suit by the manufacturer of automobile wax

against a major gasoline company which also promoted sales of car waxes. Plaintiff alleged that defendant had engaged in illegal restraints of trade to suppress competition from plaintiff's products. Defendant argued that since plaintiff distributed the finished product manufactured by it through independent distributors, the asserted losses were remote and indirect and, therefore, plaintiff lacked standing to sue. The court held that "the operation and effect of the illegal practices was on the products (including Karseal's wax) which were competitive to the Richfield sponsored products. . . . [T]he illegal acts were directed against the manufacturers and distributors of the competing products, including Karseal's wax." *Id.* at 364. Clearly, plaintiff in *Karseal* was engaged in the manufacture and sale of the very product involved in the antitrust violation.

The opinion below in this case took note of the *Karseal* case and pointed out the factual differences from *Karseal* and the case at bar. The Court wrote:

> "Billy Baxter, Inc. was not only one step removed from the link in the production-distribution chain receiving the first impact of the alleged misconduct, but also it cannot claim to be a firm with comprehensive responsibilities for and identification with the beverages. Cf. *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9 Cir. 1955). It manufactured no products, and the bottlers did not act as its agents in doing so."

Similarly, *Sanitary Milk Producers* v. *Bergjans Farm Dairy, Inc.*, 368 F. 2d 679 (8th Cir. 1966), is another case in which plaintiffs had standing because as in *Karseal* (and unlike the case at bar), plaintiffs manufactured the finished products which were the object of the trade restraints. There, plaintiffs, a group of small dairies, sued a dairy-

farmer cooperative which had conspired to fix prices in the fluid milk market. One of the plaintiffs, whose standing was challenged, distributed its milk through a separate, but identically owned, sales company. In discussing several cases where standing was lacking, the Court of Appeals stated:

> "We feel, however, that these cases are different factually from the present one and themselves indicate that the facts of the present case would be critically distinguishing. Bergjans and its sales company do not occupy the relationship of raw material supplier and manufacturer. Bergjans put out the finished product. All the milk processed by Bergjans flows through this sales company. The latter performs no processing or manufacturing. All this demonstrates that there was directness of competition between Bergjans and Sanitary, that any recovery by Bergjans is not in the nature of a windfall, and that Bergjans' injury is something more than remote, is not derivative but direct, and is the proximate result of Sanitary's misdoing." *Id.* 688-89.

South Carolina Council of Milk Producers v. *Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966), is yet another case that turned on its facts, since plaintiff's product—raw milk—was found to be "essentially the equivalent commodity" of the defendants' product—fully processed milk. *Id.* 418. There several raw milk producers, were, therefore, held to have standing through their trade association, to sue a number of wholesale and retail grocers who had distributed milk at "unreasonably low prices," *id.* 417, in an attempt to monopolize trade. In reaching its conclusion the Fourth Circuit cited and followed the decision of the Second Circuit in *Productive Inventions, Inc.* v. *Trico Prods. Corp.*, *supra*.

Petitioner's assertion that cases in this Court conflict with the decision below is equally unfounded. In *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969), plaintiff was engaged in the sale of gasoline, the product which defendant sold at prices claimed to be discriminatory. Thus, *Perkins* did not involve the issue of whether derivative injuries suffered as a result of activities in another business gave rise to standing to sue.

The *Perkins* opinion does not even remotely suggest that this Court intended to abolish the standing to sue requirement in antitrust actions or that it intended to overrule the long line of cases which established that requirement.*

There is nothing in the case at bar indicating that this Court should review a decision merely involving application of the well-established standing rule.**

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* Petitioner's citation of other decisions in this Court is equally inappropriate. *Radovich* v. *National Football League*, 352 U.S. 445 (1957), involved only the applicability of the federal antitrust laws to professional football. *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) dealt with restraint of trade through refusals to grant certain "seals of approval" and the issue of whether a treble-damage plaintiff is obliged to prove a "public injury" in addition to plaintiff's own economic injury. No issue of standing was presented in either case.

** This Court has denied certiorari in at least seven cases involving application of the standing rule. See *SCM Corp.* v. *Radio Corp. of America*, *supra*, *cert. denied*, 395 U.S. 943 (1969) (certiorari denied one week before decision in *Perkins*); *Volasco Prods. Co.* v. *Lloyd A. Fry Roofing Co.*, *supra*, *cert. denied*, 372 U.S. 907 (1963); *Miley* v. *John Hancock Mutual Life Ins. Co.*, *supra*, *cert. denied*, 355 U.S. 828 (1957); *Productive Inventions, Inc.* v. *Trico Prods. Corp.*, *supra*, *cert. denied*, 350 U.S. 936 (1956); *Melrose Realty Co.* v. *Loew's, Inc.*, *supra*, *cert. denied*, 352 U.S. 890 (1956); *Harrison* v. *Paramount Pictures, Inc.*, *supra*, *cert. denied*, 348 U.S. 828 (1954); *Conference of Studio Unions* v. *Loew's Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for certiorari should be denied.

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January 18, 1971